

<p>SUPREME COURT, STATE OF COLORADO  2 East 14th Avenue  Denver, Colorado 80203</p>	<p>DATE FILED: December 19, 2023 10:33 AM  FILING ID: D9F6CE58B6542  CASE NUMBER: 2023SC116</p>
<p>On Petition for Writ of Certiorari to the  Colorado Court of Appeals,  Case No. 2021CA1142  Judges Dunn, Grove, and Schutz</p>	
<p>DISTRICT COURT, COUNTY OF DENVER  District Court Judge: The Hon. A. Bruce  Jones, District Court Case No. 19CV32214</p>	
<p>Petitioners: MASTERPIECE CAKESHOP  INC., and JACK PHILLIPS,   and</p>	
<p>Respondent: AUTUMN SCARDINA</p>	<p>▲ COURT USE ONLY ▲</p>
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<p align="center"><b>BRIEF OF AMICI CURIAE TASTRIES BAKERY AND  CATHARINE MILLER IN SUPPORT OF PETITIONERS</b></p>	

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the *amicus* brief complies with the applicable word limit set forth in C.A.R. 29(d). The brief contains 4,725 words (does not exceed 4,750 words). The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c). I acknowledge that the brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

/s/ Rebecca Messall  
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*Special Counsel to the*  
THOMAS MORE SOCIETY

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## **IDENTITY AND INTEREST OF *AMICI CURIAE***

Tastries is a Christian boutique and custom bakery, 100% owned by Catharine (“Cathy”) Miller, and located in Bakersfield, California. After retiring from a teaching career, Cathy founded Tastries in 2013 to pursue her life-long passion: cake art. Cathy is also a devoted follower of Jesus Christ, whose teachings direct every aspect of her life. As a result, Tastries follows “Design Standards” which identify services it cannot offer. These include any item that would “contradict God’s sacrament of marriage between a man and a woman.”

In 2017, after Cathy referred a same-sex couple seeking a wedding cake to a competitor bakery, both Cathy and Tastries Bakery were sued by the California Civil Rights Department (formerly the Department of Fair Employment and Housing) for violating the state’s Unruh Civil Rights Act, Cal. Civ. Code § 51, *et seq.* Five years later, in 2022, and following a week-long bench trial in the Superior Court of Kern County, California, the Court held that Cathy had not violated the Unruh Act and, alternatively, her Free Speech rights provided a complete affirmative defense. *See DFEH v. Cathy’s Creations, Inc.*, No. BCV-18-

102633, 2022 WL 18232316 (Cal. Super. Ct., Kern Cnty., Dec. 27, 2022) (“*Cathy’s Creations*”), <https://bit.ly/3TvcP7J>.

Cathy and Tastries submit this brief to relate their story and to explain how the result in their case is the same result that should be arrived at here.

### SUMMARY OF ARGUMENT

The Court of Appeals in this case gave short shrift to Jack Phillips’ argument that he did not intend to discriminate “because of” Scardina’s gender identity, “but, rather, because of the message conveyed by [the cake].” *Scardina v. Masterpiece Cakeshop, Inc.*, 2023 COA 8, ¶¶58-59. As explained in Jack’s Response to Scardina’s Notice of Supplemental Authority, as a matter of First Amendment jurisprudence, the “distinction between status and message” is a real distinction. *303 Creative LLC v. Elenis*, 600 U.S. 570, 595 n.3 (2023).

But this reasoning applies outside the context of the First Amendment. It actually reveals that the traditional “conduct” v. “status” distinction that the Court of Appeals refused to recognize is far more nuanced, and allows for other exceptions—beside “message.” In Cathy’s

case, the Court applied that far more nuanced analysis and found that she had not violated the Unruh Act because, as a matter of fact, her “*only* intent, her only motivation, was fidelity to her sincere Christian beliefs,” and because “at no time was a Tastries design standard created, or applied, as a pretext to discriminate or make a distinction based on a person’s sexual orientation.” *Cathy’s Creations*, ¶¶31-36.

The Court should apply the same reasoning here and find that Jack Phillips did not violate CADA because, as a matter of fact, he never intended to discriminate on the basis of gender identity.

## **ARGUMENT**

### **I. The Story of Cathy Miller and Tastries Bakery**

#### **A. Overview of Cathy’s Business and Faith**

Cathy is a creative designer who owns and operates Cathy’s Creations, Inc., dba Tastries—a small Christian boutique and custom bakery in Bakersfield, California. Founded in 2013, Tastries is primarily a custom bakery that will collaborate with clients to design custom cakes, cookies and pastries for their event or occasion. With Tastries, Cathy directs a team of culinary artists who, by creating a vast selection of

artistic bakery designs, help enrich her clients' life celebrations. Prior to owning Tastries, she was a teacher in preschool, elementary school, middle school, and high school for 30 years.

Cathy is also a practicing Christian and woman of deep faith; she seeks to honor God in all aspects of her life. Jesus taught that the greatest commandments are to “Love the Lord your God with all your heart and with all your soul and with all your mind and with all your strength. The second is this: Love your neighbor as yourself.” *Mark* 12:30-31. How she treats people and how she runs her business is very important to her. She believes God has called her to abide by His precepts. In other words, she strives to honor God by making her life edifying to Him.

Like many Christians, Cathy believes that marriage is a sacred covenantal union between one man and one woman. God's plan for marriage comes straight from His Word: “[F]rom the beginning of creation, God made them male and female, for this reason, a man will leave his father and mother and be united with his wife and the two will become one flesh. So they are no longer two, but one.” *Mark* 10:6-9. Weddings therefore signify that the “two [have] become one flesh.” *Id.*

This belief guides Tastries' marriage-related products and services. However, Cathy does not require anyone to share her views on marriage as a condition for service or employment. The bakery has served many LGBT customers and Cathy has hired multiple members of the LGBT community. *See Cathy's Creations*, ¶8. Cathy's faith teaches her to welcome and serve people from all lifestyles, including individuals of all races, creeds, marital situations, gender identities, and sexual orientations.

In other words, Cathy offers her artistic vision to create specially designed custom cakes and desserts for anyone. She serves all people, but she cannot design custom cakes that express ideas or celebrate events that conflict with her core religious beliefs. It would violate the first and greatest commandment if Cathy were to create custom cakes that express messages or celebrate events that conflict with her love for God. *See Ephesians 4:29; 1 Timothy 5:22; 1 Corinthians 10:1-22; 2 Corinthians 6:14-18.*

## **B. Tastries Bakery Design Standards**

In line with Cathy's religious beliefs, there are many custom cakes that she will not create. For example, she will not design cakes that celebrate divorce, that display violence, that glorify drunkenness or drug use, that contain explicit sexual content, that present gory or demonic images or satanic symbols. She also will not design cakes that demean any person or group for any reason, or that promote racism, or any other message that conflicts with fundamental Christian principles. This has been Tastries policy from the beginning and has been a written policy for many years. *See Cathy's Creations*, ¶¶9-12.

Once, a man requested a beautiful seven-tier cake that he planned to use at a vow-renewal ceremony that he was arranging for his wife. He intended to surprise her at the ceremony by announcing his intention to obtain a divorce. Because using Tastries' cakes in this manner violates Cathy's policy about demeaning and humiliating people, and about the sacramental nature of marriage, Cathy declined the order. *See Cathy's Creations*, ¶13.

### C. Summary of the Incident with Eileen and Mireya

Tastries offers a complementary cake-tasting for couples who are interested in ordering a custom wedding cake. During one of these tastings, Cathy welcomed Mireya and Eileen Rodriguez-Del Rio<sup>1</sup> to her bakery on August 26, 2017, just like she would any other prospective client. They came into the shop with an older woman (Eileen's mother) and joined a couple of men who were already there. Cathy believed these five were the bride and groom along with the maid of honor, the best man, and a mother. *See Cathy's Creations*, ¶18.

When Cathy met with the group, she began by asking for details about their custom wedding cake request. A few minutes in, she asked, "Which one of you is the groom?" One of the men pointed to Eileen and said, "She is." Cathy knew that she could not create custom cakes to celebrate a same-sex wedding, so told them that she could not make their wedding cake because doing so would violate her Christian beliefs. Cathy offered to connect them with a wedding cake designer at a competitor

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<sup>1</sup> Eileen and Mireya had been legally married, and hyphenated their last names, the prior December. *Cathy's Creations*, ¶87.

bakery. Instead, one of the men startled Cathy by reaching over her shoulder to grab the order form. Then the group abruptly left the shop. *Id.*, ¶¶19-20.

**D. Aftermath of the Incident: News Frenzy, Criminal Harassment, and a Wedding**

The cake tasting with Eileen and Mireya began shortly after 1:00 p.m., and lasted a few minutes. Shortly after leaving, Eileen, Mireya, and Eileen’s “man-of-honor” all posted on Facebook. This began a social media storm that went viral. Tastries was engulfed in negative Facebook and Yelp reviews along with a call to action by local LGBT advocates. Tastries’ social media pages were under siege by vicious written attacks on Cathy’s character and about the bakery. The bakery was also inundated with malicious emails and phone calls that included pornographic images and threats of violence. *See Cathy’s Creations*, ¶21.

Within a few hours of the Facebook postings, Tastries also began receiving calls from numerous media outlets, demanding statements and interviews. Reporters swarmed the Tastries parking lot and began interviewing customers. The chronic phone, email and social media harassment lasted for three months. They start up again every time

Tastries is mentioned in the news. After these events, Tastries lost many employees due to the threats and hateful comments.

In response to the great publicity, various wedding professionals offered their services free of charge to Eileen and Mireya, including a photographer, a cake artist, and a hair and makeup stylist. *See id.*, ¶22. For their wedding cake, Eileen and Mireya ultimately chose a “cake bar” dessert system, with many more flavors and options than available with a traditional wedding cake. However, they also chose to have a three-tiered wedding cake as a centerpiece, primarily made of Styrofoam, with only the top tier made of cake for the traditional cake-cutting.

### **E. The California Prosecution**

After their wedding, Eileen and Mireya filed a complaint with the California Civil Rights Department, which opened an investigation. During its investigation, the CCRD petitioned the California Superior Court to issue a preliminary injunction, which was rebuffed. *DFEH v. Miller*, No. BCV-17-102855, 2018 WL 747835 (Cal. Super. Ct., Kern Cnty., Feb. 5, 2018) (Lampe, J.).

Then, after investigating for a year, the CCRD filed an enforcement action in October 2018. In early 2022, the CCRD’s motion for summary judgment was denied on the basis that it had “not demonstrated the requisite intent” to discriminate by Cathy. *DFEH v. Cathy’s Creations, Inc.*, No. BCV-18-102633, 2022 WL 18232314 (Cal. Super. Ct., Kern Cnty., Jan. 6, 2022) (Bradshaw, J.). Then, following a week-long bench trial, the Court entered judgment in Cathy’s favor, for numerous reasons, including specifically CCRD’s failure to prove the requisite intent. *See Cathy’s Creations*, ¶¶31-36 (Bradshaw, J.).

## **II. The Lack of an “Intent to Discriminate” Analysis Should Apply Here**

### **A. Both the Unruh Act and CADA Require Intentional Discrimination**

California’s Unruh Act provides that “[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their ... sexual orientation ... are entitled to the full and equal ... services in all business establishments....” Cal. Civ. Code § 51(b); *see also id.* at subd. (e)(5) (terms encompass “gender identity”). A “denial of the rights” created by this provision is prosecutable by the California Civil Rights

Department, *see* Cal. Gov. Code § 12948, or by the aggrieved party. *See* Cal. Civ. Code § 52.

However, the Unruh Act also provides that it “shall not be construed to confer any right or privilege on a person that is ... applicable alike to persons of every ... sexual orientation...” Cal. Civ. Code § 51(c). Flowing from this provision, courts have inferred a requirement of “intentional discrimination”—a mere disparate impact is insufficient. *Cohn v. Corinthian Colleges, Inc.*, 169 Cal.App.4th 523, 527 & n.3 (2008). Thus, “[a] policy that is neutral on its face is not actionable under the Unruh Act, even when it has a disproportionate impact on a protected class.” Such a policy is only actionable where the “neutral policy was used as a pretext to discriminate against a protected class of individuals.” *Turner v. Association of American Medical Colleges*, 167 Cal.App.4th 1401, 1408-11 (2008).

The Colorado Anti-Discrimination Act (“CADA”), which similarly prohibits discrimination on the basis of sexual orientation or gender identity, also has an intentionality requirement. As stated by the Court

of Appeal here, a plaintiff must establish that the discrimination occurred “because of” his protected characteristic. *See Scardina*, ¶58.

**B. Unpacking the Traditional “Conduct” v. “Status” Distinction**

Cases interpreting the Unruh Act have also held that “[t]he Unruh Act does not prohibit discrimination against persons based upon their conduct,” but only based on “the individual’s membership in a particular class of persons.” *Cloutier v. Prudential Insurance Co. of America*, 964 F.Supp. 299, 304. (N.D. Cal. 1997). One example of this would be that the “status” of being a “felon” is not covered by the Unruh Act, because it is really a “conduct” based distinction of having committed a felony. *Semler v. General Electric Capital Corp.*, 196 Cal.App.4th 1380, 1395 (2011).

However, as the Court of Appeal here recognized, *Scardina*, ¶59, the “conduct” vs. “status” distinction is sometimes a false one. Some “conduct” is *per se* part of the “status,” such that discrimination on the basis of “conduct” is discrimination on the basis of “status.” *See* Cal. Civ. Code § 51(e)(4) (religion for purposes of the Unruh Act includes “all aspects of religious belief, observance, and practice.”); *cf. Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270 (1993) (because

only Jews wear them, “[a] tax on wearing yarmulkes is a tax on Jews.”). But how this principle applies here is more nuanced than the *Scardina* court appreciated.

As the *Scardina* court stated, in several contexts, “the Supreme Court has rejected efforts to differentiate between discrimination based on a person’s status and discrimination based on conduct that is inextricably intertwined with such status.” *Scardina*, ¶59. Thus, the “status” of being LGBT is inextricably intertwined with the “conduct” of engaging in homosexual intimate activity, *Christian Legal Society v. Martinez*, 561 U.S. 661, 668 (2010); *Lawrence v. Texas*, 539 U.S. 558, 575 (2003), or the “conduct” of entering into a same-sex marriage. *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015); *United States v. Windsor*, 570 U.S. 744, 770 (2013).

Using the example of a felon above, if a business refused to provide service to felons—whether a complete ban on entering the premises, or simply unequal services—that would not violate California’s Unruh Act because that is a conduct-based distinction divorced from any protected

“status.” *Semler*, 196 Cal.App.4th at 1395. The business could enact a policy that anybody who had ever committed a felony was not welcome.

But if a business enacted a policy that it will not serve anyone (whether a self-identified member of the LGBT community or not) who had ever engaged in homosexual intimate relations (instead of being celibate), entered into a same-sex marriage, or transitioned to another sex, that arguably would violate the Unruh Act because the conduct is *per se* part of the protected characteristic.

**C. In Certain Contexts, There is Space Between LGBT “Conduct” and LGBT “Status,” Making the Defendant’s Intent Paramount**

The litany of wedding professional cases across the country, however, reveal that the traditional “conduct” v. “status” distinction (as in the case of a felon) or false distinction (as in the case of religion and the LGBT community), is far more nuanced than the Court of Appeal here appreciated.

**1. The “Message” v. “Status” Distinction**

In *Obergefell*, *Masterpiece*, and *303 Creative*, the Supreme Court explained that there can be space between a party’s beliefs about

marriage and his beliefs about sexual orientation—analogous to how there is space between a party’s beliefs about abortion and his beliefs about sex. In all three cases, the specific context wherein that space emerged *was the intended expression of a message of support*.

As stated in *Masterpiece Cakeshop*:

[T]here is some force to the argument that the baker was not unreasonable in deeming it lawful to decline to take an action that *he understood to be an expression of support* for the[] validity [of same-sex marriages] when that expression was contrary to his sincerely held religious beliefs, at least insofar as his refusal was limited to refusing to create and express a message in support of gay marriage....

*Masterpiece Cakeshop, Ltd. v. CCRC*, 138 S.Ct. 1719, 1728 (2018)  
(emphasis added).

Since that time, numerous cases have applied this reasoning. Sometimes the “message” is obvious—othertimes, not so obvious. For example, in *Hands On Originals*, a Kentucky civil rights agency brought litigation against a t-shirt printer who refused to print shirts for a Pride Parade. To be sure, it *could have* been the case that the printer turned away the customer on the basis of LGBT status (or race, sex, creed), and raised his objection to the “message” as a pretext. But as explained by

Justice Buckingham in concurrence, the facts strongly indicated a good faith objection:

The record discloses three essential facts...: First, Hands On has an established practice of declining orders because of what *Hands On perceives to be their morally-objectionable messages*, no matter who requested them.... Second, Hands On accepted and completed an order from a lesbian singer who performed at the 2012 Pride Festival. Third, at no time did Hands On inquire or know the sexual orientation or gender identity of the persons with whom it dealt on behalf of GLSO. *These facts indicate that Hands On was in good faith objecting to the message it was being asked to disseminate.*

*Lexington-Fayette Urban County v. Hands On Originals*, 592 S.W.3d 291, 303 (Ky. 2019) (Buckingham, J., concurring) (emphasis added).<sup>2</sup>

Similarly, in *Ashers Baking Co.*, a gay man decided to bring a cake to a party hosted by an LGBT activism group campaigning for same-sex marriage in Northern Ireland. He attempted to purchase from a bakery a cake decorated with “a coloured picture of cartoon-like characters ‘Bert and Ernie’, the QueerSpace logo, and the headline ‘Support Gay Marriage’.” *Lee v. Ashers Baking Co. Ltd.* [2018] UKSC 49, ¶¶10-12. Upon declining the order, the bakery was charged by a Northern Ireland civil

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<sup>2</sup> The majority dismissed the case on standing grounds.

rights agency with discrimination on the basis of sexual orientation or, alternatively, discrimination on the basis of association with LGBT persons. *Id.*, ¶¶13-15.

Again, it could hypothetically have been the case that the baker turned away the customer because of his LGBT status, but the U.K. Supreme Court found that, as a matter of fact, “[t]he bakery would have refused to supply this particular cake to anyone, whatever their personal characteristics. So there was no discrimination on grounds of sexual orientation,” and “there is a clear distinction between refusing to produce a cake conveying a particular message, for any customer who wants such a cake, and refusing to produce a cake for the particular customer who wants it because of that customer’s characteristics.” *Id.*, ¶62; *cited approvingly by 303 Creative*, 600 U.S. at 595 n.3

The reasoning from *Masterpiece*, was also applied by the Arizona Supreme Court in *Brush & Nib Studio*, a case about a party invitation calligrapher who could not in good conscience design invitations for same-sex marriages. The decisions in *Hands On Originals* and *Ashers Baking Co.* are somewhat obvious—the business was being directly asked to

print political slogans on t-shirts and cakes. But, like in *Masterpiece*, the Arizona Supreme Court held that the reasoning equally applied in the wedding context.

In *Brush & Nib Studio*, the analysis was ultimately *an intensely fact-based one*. In the context of the wedding professional—just like in the above examples—the hypothetical example of a business objecting on the basis of LGBT-“status,” and raising “message” as a pretext, is perfectly plausible. Thus, for the wedding calligrapher, the true basis of objection could be either “status” or “message,” and the job of the fact-finder was to figure out which it truly was.

Ultimately, the Arizona Supreme Court held that when all the evidence supported a “message” objection—not a pretextual “status” objection—the lower courts’ refusal to consider it and instead assume a status distinction as a matter of law, was improper.

Our decision today is limited ... and the protection afforded ... is based solely on the celebratory *messages* Plaintiffs convey (or refuse to convey), not the race, gender or sexual orientation of the customer. [citation] Indeed, Plaintiffs have never asserted that their faith precludes them from serving same-sex couples, or that it requires them to refuse service to a customer based on their sexual orientation. Rather, as noted

above, Plaintiffs consistently testified that they are willing to serve all customers, regardless of their status. But what they refuse to do is violate their religious convictions by creating a message for *anyone* that celebrates same-sex marriage.

*Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 304 (2019).

## **2. The “Intent” Analysis of the “Message” v. “Status” Distinction Applies Outside that Context**

The vast majority of wedding professional cases are decided on the basis of the Free Speech clause. *See, e.g., 303 Creative*, 600 U.S. 570. As pre-enforcement challenges framed by the plaintiff, they focus on the issue of whether the business’s service is protected by the Free Speech clause or not. *See, e.g., Telescope Media Group v. Lucero*, 936 F.3d 740 (8th Cir. 2019); *Chelsey Nelson Photography, LLC v. Louisville/Jefferson County Metro Gov.*, 624 F.Supp.3d 761 (W.D. Ky. 2022).

But where the business’s actual *intent* is to object to expressing a perceived message of support for same-sex marriage—or some other non-invidious intent—there is no violation of the anti-discrimination statute to begin with. *See* § II.C.1, *supra*. That issue has, all too often, been ignored by courts in their rush to address the Free Speech issues. But examples concerning the Unruh Act show it is a serious issue.

As illustration, in *Cohn*, cited above, the Los Angeles Angels baseball team had a home game on Mother's Day. 169 Cal.App.4th at 526. To honor "mothers," Corinthian Colleges gave away a free tote bag to all "females 18 years old and over." *Id.* Mr. Cohn requested a free bag, but was denied, and then sued alleging sex discrimination. *Id.* The court of appeal held that there was no claim, because the baseball team had no discriminatory intent—its "intent was to honor mothers on Mother's Day." *Id.* at 528.

Similarly, in *Koebke*, the California Supreme Court addressed the situation where a country club restricted facility access to members and their spouses. An LGBT couple in a domestic partnership sued under the Unruh Act, seeking damages under two theories of discrimination. With respect to the time before enactment of the Domestic Partner Act, their argument boiled down to the fact that, because same-sex marriage had not yet been legal in California, being unmarried was conduct closely related to LGBT-status such that marital status discrimination (when combined with knowledge of the patron's sexual orientation) was *per se* sexual orientation discrimination.

The California Supreme Court rejected this argument. The Court held that the country club could not distinguish between marriages and domestic partnerships, but for the time prior to the enactment of the Domestic Partner Act, the Court held that the marriage-related policy was facially neutral, and therefore nonactionable in the absence of evidence that it was adopted as a pretext with the intent “to accomplish discrimination on the basis of sexual orientation.” *Koebke v. Bernardo Heights Country Club*, 36 Cal.4th 824, 853-54 (2005).

Finally, in *Cathy’s Creations*, the Court found that Tastries’ “Design Standards” and policies regarding wedding cakes were not triggered by any customer’s sexual orientation, or by the customer engaging in conduct closely associated with a LGBT orientation (*i.e.*, that individual having engaged in homosexual intimate activity or having personally entered into a same-sex marriage). *Cathy’s Creations*, ¶¶31-36.

As noted above, Tastries’ written policies state that “[a]ll custom orders must follow Tastries Design Standards,” which in turn elaborate that “cakes must not contradict God’s sacrament of marriage between a man and a woman.” Thus, Tastries’ policy is a facially neutral policy

about *Cathy's religious views on marriage*. The “intent” was to focus on Cathy and on marriage—not on any customer. As stated by the Court:

The evidence affirmatively showed that Miller’s *only* intent, her only motivation, was fidelity to her sincere Christian beliefs. Miller’s only motivation in creating and following the design standards, and in declining to involve herself or her business in designing a wedding cake for a marriage at odds with her faith, was to observe and practice her own Christian faith, i.e., to avoid “violat[ing] fundamental Christian principles” or “contradict[ing] God’s sacrament of marriage between a man and a woman.”

...

The evidence affirmatively showed that at no time was Miller’s conduct a pretext to discriminate or make a distinction based on a person’s sexual orientation. The evidence affirmatively showed that at no time was a Tastries design standard created, or applied, as a pretext to discriminate or make a distinction based on a person’s sexual orientation. *Miller’s only motivation, at all relevant times, was to act in a manner consistent with her sincere Christian beliefs about what the Bible teaches regarding marriage.*

*Cathy’s Creations*, ¶¶31, 36 (some emphasis added).

Religious “conduct” is no less intimately tied up with religious “status” than same-sex “conduct” is tied up with LGBT “status.” Thus, Tastries’ policy *prohibits Tastries* from writing political slogans on cakes for political events regarding marital issues (divorce, same-sex marriage,

etc.); it applies to engaging in the perceived symbolic speech of creation a traditional wedding cake (white with three or more tiers) for events that would demean and de-sacramentalize marriage (such as ironically using it to announce a divorce); and it applies to engaging in the symbolic speech of creating a traditional wedding cake for use as the celebratory centerpiece at an event that calls itself a wedding yet involves anything other than a lifelong union of one man and one woman.

The Free Speech analysis obviously provides facts that undergird the reality of the business's *intent*. In Cathy's case, the fact the Eileen and Mireya ultimately opted for a Styrofoam, three-tiered, wedding cake drove home the fact that all parties understood that they were seeking more than mere dessert for their guests. And facts such as that ultimately persuaded the Court that Cathy had a valid Free Speech defense. *Cathy's Creations*, ¶¶69-92. But the Court there properly, and first, held that Cathy lacked the requisite "intent" to discriminate simply because she limits her wedding cakes to marriages involving one man and one woman.

One might assume that such a policy is necessarily a pretext for sexual orientation discrimination. But such policies encompass all biblical admonitions on marriage, such as unions of three or more people, unions not intended to be lifelong, unions involving members of the same sex, and unions following an unjustified divorce. If a heterosexual person came in seeking to purchase a wedding cake for a same-sex wedding, Tastries equally could not design the cake. *Cf. Hands On Originals*, 592 S.W.3d 291. Or if a polyamorous couple came in seeking a wedding cake, Tastries would also have to refer them elsewhere. *See* Maura Irene Strassberg, *Can We Still Criminalize Polygamy: Strict Scrutiny of Polygamy Laws Under State Religious Freedom Restoration Acts After Hobby Lobby*, 2016 U. Ill. L. Rev. 1605 (2016) (discussing examples of modern polyamory, including Mormon Fundamentalism).

**D. Jack Phillips Lacked the Requisite Intent to Discriminate**

The Court of Appeal here found that Jack Phillips had discriminated “because of” Scardina’s gender identity in a few short paragraphs, without any analysis of Jack’s intent. *See Scardina*, ¶¶52-59. But as explained in Jack’s brief, the trial court made numerous

factual findings that his intent was to object to the message of the cake—the message that Scardina actually intended—it just found that intent legally irrelevant. For the reasons discussed above, this Court should not dispose of those intent findings so casually.

The Court need not set a bright line rule that threatens to allow “a long list of persons who provide goods and services for marriages and weddings [to] refuse to do so for gay persons, thus resulting in a community-wide stigma.” *Masterpiece*, 138 S.Ct. at 1727. Rather, the most appropriate test is to instruct the lower courts to actually look at the facts. Here, there was no intent to discriminate—that should be dispositive.

## CONCLUSION

The Court should reverse and remand with instructions to enter judgment in Jack's favor.

Respectfully submitted this 19th day of December 2023.

*/s/ Rebecca Messall* \_\_\_\_\_

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## CERTIFICATE OF SERVICE

I hereby certify that I have on this 19th day of December, 2023, served a copy of the foregoing Brief of *Amici Curiae* Tastries Bakery and Catharine Miller in Support of Petitioners via the Colorado Courts E-Filing system, and served via the Colorado Courts E-Filing system on the parties and/or their counsel of record.

*/s/ Rebecca Messall* \_\_\_\_\_

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